

1 **Rule 1. General provisions.**

2 **Scope of rules.** These rules govern the procedure in the courts of the state of Utah
3 in all actions of a civil nature, whether cognizable at law or in equity, and in all statutory
4 proceedings, except as governed by other rules promulgated by this court or statutes
5 enacted by the Legislature and except as stated in Rule 81. They shall be liberally
6 construed and applied to achieve the just, speedy, and inexpensive determination of
7 every action. These rules govern all actions brought after they take effect and all further
8 proceedings in actions then pending. If, in the opinion of the court, applying a rule in an
9 action pending when the rule takes effect would not be feasible or would be unjust, the
10 former procedure applies.

11 **Advisory Committee Notes**

12 A primary purpose of the 2011 amendments is to give effect to the long-standing but
13 often overlooked directive in Rule 1 that the Rules of Civil Procedure should be
14 construed and applied to achieve "the just, speedy and inexpensive determination of
15 every action." The amendments serve this purpose by limiting parties to discovery that
16 is proportional to the stakes of the litigation, curbing excessive expert discovery, and
17 requiring the early disclosure of documents, witnesses and evidence that a party
18 intends to offer in its case-in-chief. The committee's purpose is to restore balance to the
19 goals of Rule 1, so that a just resolution is not achieved at the expense of speedy and
20 inexpensive resolutions, and greater access to the justice system can be afforded to all
21 members of society.

22 Due to the significant changes in the discovery rules, the Supreme Court order
23 adopting the 2011 amendments makes them effective only as to cases filed on or after
24 the effective date, November 1, 2011, unless otherwise agreed to by the parties or
25 ordered by the court.

26

1 **Rule 8. General rules of pleadings.**

2 (a) **Claims for relief.** An original claim, counterclaim, cross-claim or third-party claim
3 shall contain a short and plain: (1) statement of the claim showing that the party is
4 entitled to relief; and (2) demand for judgment for specified relief. Relief in the
5 alternative or of several different types may be demanded. A party who claims
6 damages but does not plead an amount shall plead that their damages are such as to
7 qualify for a specified tier defined by Rule 26(c)(3). A pleading that qualifies for tier 1 or
8 tier 2 discovery shall constitute a waiver of any right to recover damages above the tier
9 limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15.

10 (b) **Defenses; form of denials.** A party shall state in simple, short and plain terms
11 any defenses to each claim asserted and shall admit or deny the statements in the
12 claim. A party without knowledge or information sufficient to form a belief about the truth
13 of a statement shall so state, and this has the effect of a denial. Denials shall fairly meet
14 the substance of the statements denied. A party may deny all of the statements in a
15 claim by general denial. A party may specify the statement or part of a statement that is
16 admitted and deny the rest. A party may specify the statement or part of a statement
17 that is denied and admit the rest.

18 (c) **Affirmative defenses.** An affirmative defense shall contain a short and plain: (1)
19 statement of the affirmative defense; and (2) a demand for relief. A party shall set forth
20 affirmatively in a responsive pleading accord and satisfaction, arbitration and award,
21 assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel,
22 failure of consideration, fraud, illegality, injury by fellow servant, laches, license,
23 payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any
24 other matter constituting an avoidance or affirmative defense. If a party mistakenly
25 designates a defense as a counterclaim or a counterclaim as a defense, the court, on
26 terms, may treat the pleadings as if the defense or counterclaim had been properly
27 designated.

28 (d) **Effect of failure to deny.** Statements in a pleading to which a responsive
29 pleading is required, other than statements of the amount of damage, are admitted if not
30 denied in the responsive pleading. Statements in a pleading to which no responsive
31 pleading is required or permitted are deemed denied or avoided.

32 (e) **Consistency.** A party may state a claim or defense alternately or hypothetically,
33 either in one count or defense or in separate counts or defenses. If statements are
34 made in the alternative and one of them is sufficient, the pleading is not made
35 insufficient by the insufficiency of an alternative statement. A party may state legal and
36 equitable claims or legal and equitable defenses regardless of consistency.

37 (f) **Construction of pleadings.** All pleadings shall be construed to do substantial
38 justice.

39 **Advisory Committee Notes**

40 The pleading standard under Rule 8 remains “notice pleading” as exemplified by the
41 official forms appended to the Rules. But parties are encouraged to plead facts that
42 entitle them to relief or establish affirmative defenses because more expansive
43 pleadings will trigger broader disclosures from the opponent under Rule 26. This
44 encouragement is consistent with the general approach of the 2011 amendments which
45 require each party to disclose its affirmative case early in the process so that the
46 adversary might evaluate its merits and focus the need for discovery.

47 The amount of damages pled will determine the amount of standard discovery
48 available under Rule 26(c)(3). It would be unfair for a party to plead a smaller amount
49 of damages in order to take advantage of the streamlined discovery and then seek to
50 recover greater damages. Thus, Rule 8 provides that a party waives its right to recover
51 damages in excess of the maximums provided for that tier unless the pleading is
52 amended. The trial court may determine if the amendment requires further discovery.

53

1 **Rule 9. Pleading special matters.**

2 (a)(1) **Capacity.** It is not necessary to aver the capacity of a party to sue or be sued
3 or the authority of a party to sue or be sued in a representative capacity or the legal
4 existence of an organized association of persons that is made a party. A party may raise
5 an issue as to the legal existence of any party or the capacity of any party to sue or be
6 sued or the authority of a party to sue or be sued in a representative capacity by specific
7 negative averment, which shall include facts within the pleader's knowledge. If raised as
8 an issue, the party relying on such capacity, authority, or legal existence, shall establish
9 the same on the trial.

10 (a)(2) **Designation of unknown defendant.** When a party does not know the name
11 of an adverse party, he may state that fact in the pleadings, and thereupon such
12 adverse party may be designated in any pleading or proceeding by any name; provided,
13 that when the true name of such adverse party is ascertained, the pleading or
14 proceeding must be amended accordingly.

15 (a)(3) **Actions to quiet title; description of interest of unknown parties.** In an
16 action to quiet title wherein any of the parties are designated in the caption as
17 "unknown," the pleadings may describe such unknown persons as "all other persons
18 unknown, claiming any right, title, estate or interest in, or lien upon the real property
19 described in the pleading adverse to the complainant's ownership, or clouding his title
20 thereto."

21 (b) **Fraud, mistake, condition of the mind.** In all averments of fraud or mistake, the
22 circumstances constituting fraud or mistake shall be stated with particularity. Malice,
23 intent, knowledge, and other condition of mind of a person may be averred generally.

24 (c) **Conditions precedent.** In pleading the performance or occurrence of conditions
25 precedent, it is sufficient to aver generally that all conditions precedent have been
26 performed or have occurred. A denial of performance or occurrence shall be made
27 specifically and with particularity, and when so made the party pleading the performance
28 or occurrence shall on the trial establish the facts showing such performance or
29 occurrence.

30 (d) **Official document or act.** In pleading an official document or act it is sufficient to
31 aver that the document was issued or the act done in compliance with law.

32 (e) **Judgment.** In pleading a judgment or decision of a domestic or foreign court,
33 judicial or quasi judicial tribunal, or of a board or officer, it is sufficient to aver the
34 judgment or decision without setting forth matter showing jurisdiction to render it. A
35 denial of jurisdiction shall be made specifically and with particularity and when so made
36 the party pleading the judgment or decision shall establish on the trial all controverted
37 jurisdictional facts.

38 (f) **Time and place.** For the purpose of testing the sufficiency of a pleading,
39 averments of time and place are material and shall be considered like all other
40 averments of material matter.

41 (g) **Special damage.** When items of special damage are claimed, they shall be
42 specifically stated.

43 (h) **Statute of limitations.** In pleading the statute of limitations it is not necessary to
44 state the facts showing the defense but it may be alleged generally that the cause of
45 action is barred by the provisions of the statute relied on, referring to or describing such
46 statute specifically and definitely by section number, subsection designation, if any, or
47 otherwise designating the provision relied upon sufficiently clearly to identify it. If such
48 allegation is controverted, the party pleading the statute must establish, on the trial, the
49 facts showing that the cause of action is so barred.

50 (i) **Private statutes; ordinances.** In pleading a private statute of this state, or an
51 ordinance of any political subdivision thereof, or a right derived from such statute or
52 ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of
53 its passage or by its section number or other designation in any official publication of the
54 statutes or ordinances. The court shall thereupon take judicial notice thereof.

55 (j) **Libel and slander.**

56 (j)(1) **Pleading defamatory matter.** It is not necessary in an action for libel or
57 slander to set forth any intrinsic facts showing the application to the plaintiff of the
58 defamatory matter out of which the action arose; but it is sufficient to state generally that
59 the same was published or spoken concerning the plaintiff. If such allegation is
60 controverted, the party alleging such defamatory matter must establish, on the trial, that
61 it was so published or spoken.

62 (j)(2) **Pleading defense.** In his answer to an action for libel or slander, the defendant
63 may allege both the truth of the matter charged as defamatory and any mitigating
64 circumstances to reduce the amount of damages, and, whether he proves the
65 justification or not, he may give in evidence the mitigating circumstances.

66 (k) **Renew judgment.** A complaint alleging failure to pay a judgment shall describe
67 the judgment with particularity or attach a copy of the judgment to the complaint.

68 (l) **Allocation of fault.**

69 (l)(1) A party seeking to allocate fault to a non-party under Title 78B, Chapter 5, Part
70 8 shall file:

71 (l)(1)(A) a description of the factual and legal basis on which fault can be allocated;
72 and

73 (l)(1)(B) information known or reasonably available to the party identifying the non-
74 party, including name, address, telephone number and employer. If the identity of the
75 non-party is unknown, the party shall so state.

76 (l)(2) The information specified in subsection (l)(1) must be included in the party's
77 responsive pleading if then known or must be included in a supplemental notice filed
78 within a reasonable time after the party discovers the factual and legal basis on which
79 fault can be allocated. The court, upon motion and for good cause shown, may permit a
80 party to file the information specified in subsection (l)(1) after the expiration of any
81 period permitted by this rule, but in no event later than 90 days before trial.

82 (l)(3) A party may not seek to allocate fault to another except by compliance with this
83 rule.

84

1 **Rule 16. Pretrial conferences.**

2 (a) **Pretrial conferences.** The court, in its discretion or upon motion, may direct the
3 attorneys and, when appropriate, the parties to appear for such purposes as:

4 (a)(1) expediting the disposition of the action;

5 (a)(2) establishing early and continuing control so that the case will not be protracted
6 for lack of management;

7 (a)(3) discouraging wasteful pretrial activities;

8 (a)(4) improving the quality of the trial through more thorough preparation;

9 (a)(5) facilitating mediation or other ADR processes for the settlement of the case;

10 (a)(6) considering all matters as may aid in the disposition of the case;

11 (a)(7) establishing the time to join other parties and to amend the pleadings;

12 (a)(8) establishing the time to file motions;

13 (a)(9) establishing the time to complete discovery;

14 (a)(10) extending fact discovery;

15 (a)(11) setting the date for pretrial and final pretrial conferences and trial;

16 (a)(12) providing for the preservation, disclosure or discovery of electronically stored
17 information;

18 (a)(13) considering any agreements the parties reach for asserting claims of
19 privilege or of protection as trial-preparation material after production; and

20 (a)(14) considering any other appropriate matters.

21 (b) **Trial settings.** Unless an order sets the trial date, any party may and the plaintiff
22 shall, at the close of all discovery, certify to the court that discovery is complete, that
23 any required mediation or other ADR processes have been completed or excused and
24 that the case is ready for trial. The court shall schedule the trial as soon as mutually
25 convenient to the court and parties. The court shall notify parties of the trial date and of
26 any final pretrial conference.

27 (c) **Final pretrial conferences.** The court, in its discretion or upon motion, may
28 direct the attorneys and, when appropriate, the parties to appear for such purposes as
29 settlement and trial management. The conference shall be held as close to the time of
30 trial as reasonable under the circumstances.

31 (d) **Sanctions.** If a party or a party's attorney fails to obey an order, if a party or a
32 party's attorney fails to attend a conference, if a party or a party's attorney is
33 substantially unprepared to participate in a conference, or if a party or a party's attorney
34 fails to participate in good faith, the court, upon motion or its own initiative, may take any
35 action authorized by Rule 37(e).

36 **Advisory Committee Notes**

37 For the purposes of this rule, "ADR" is as defined in CJA Rule 4-510.

38

1 **Rule 26. General provisions governing disclosure and discovery.**

2 (a) **Disclosure.** This rule applies unless changed or supplemented by a rule
3 governing disclosure and discovery in a practice area.

4 (a)(1) **Initial disclosures.** Except in cases exempt under paragraph (a)(3), a party
5 shall, without waiting for a discovery request, provide to other parties:

6 (a)(1)(A) the name and, if known, the address and telephone number of:

7 (a)(1)(A)(i) each individual likely to have discoverable information supporting its
8 claims or defenses, unless solely for impeachment, identifying the subjects of the
9 information; and

10 (a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for
11 an adverse party, a summary of the expected testimony;

12 (a)(1)(B) a copy of all documents, data compilations, electronically stored
13 information, and tangible things in the possession or control of the party that the party
14 may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that
15 have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

16 (a)(1)(C) a computation of any damages claimed and a copy of all discoverable
17 documents or evidentiary material on which such computation is based, including
18 materials about the nature and extent of injuries suffered;

19 (a)(1)(D) a copy of any agreement under which any person may be liable to satisfy
20 part or all of a judgment or to indemnify or reimburse for payments made to satisfy the
21 judgment; and

22 (a)(1)(E) a copy of all documents to which a party refers in its pleadings.

23 (a)(2) **Timing of initial disclosures.** The disclosures required by paragraph (a)(1)
24 shall be made:

25 (a)(2)(A) by the plaintiff within 14 days after service of the first answer to the
26 complaint; and

27 (a)(2)(B) by the defendant within 28 days after the plaintiff's first disclosure or after
28 that defendant's appearance, whichever is later.

29 (a)(3) Exemptions.

30 (a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the
31 requirements of paragraph (a)(1) do not apply to actions:

32 (a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings
33 of an administrative agency;

34 (a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

35 (a)(3)(A)(iii) to enforce an arbitration award;

36 (a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4.

37 (a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph
38 (a)(1) are subject to discovery under paragraph (b).

39 (a)(4) **Expert testimony.**

40 (a)(4)(A) **Disclosure of expert testimony.** A party shall, without waiting for a
41 discovery request, provide to the other parties the following information regarding any
42 person who may be used at trial to present evidence under Rules 702, 703, or 705 of
43 the Utah Rules of Evidence and who is retained or specially employed to provide expert
44 testimony in the case or whose duties as an employee of the party regularly involve
45 giving expert testimony: (i) the expert's name and qualifications, including a list of all
46 publications authored within the preceding 10 years, and a list of any other cases in
47 which the expert has testified as an expert at trial or by deposition within the preceding
48 four years, (ii) a brief summary of the opinions to which the witness is expected to
49 testify, (iii) all data and other information that will be relied upon by the witness in
50 forming those opinions, and (iv) the compensation to be paid for the witness's study and
51 testimony.

52 (a)(4)(B) **Limits on expert discovery.** Further discovery may be obtained from an
53 expert witness either by deposition or by written report. A deposition shall not exceed
54 four hours and the party taking the deposition shall pay the expert's reasonable hourly
55 fees for attendance at the deposition. A report shall be signed by the expert and shall
56 contain a complete statement of all opinions the expert will offer at trial and the basis
57 and reasons for them. Such an expert may not testify in a party's case-in-chief
58 concerning any matter not fairly disclosed in the report. The party offering the expert
59 shall pay the costs for the report.

60 (a)(4)(C) **Timing for expert discovery.**

61 (a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert
62 testimony is offered shall provide the information required by paragraph (a)(4)(A) within

63 seven days after the close of fact discovery. Within seven days thereafter, the party
64 opposing the expert may serve notice electing either a deposition of the expert pursuant
65 to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B).
66 The deposition shall occur, or the report shall be provided, within 28 days after the
67 election is made. If no election is made, then no further discovery of the expert shall be
68 permitted.

69 (a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which
70 expert testimony is offered shall provide the information required by paragraph (a)(4)(A)
71 within seven days after the later of (i) the date on which the election under paragraph
72 (a)(4)(C)(i) is due, or (ii) receipt of the written report or the taking of the expert's
73 deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party
74 opposing the expert may serve notice electing either a deposition of the expert pursuant
75 to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B).
76 The deposition shall occur, or the report shall be provided, within 28 days after the
77 election is made. If no election is made, then no further discovery of the expert shall be
78 permitted.

79 (a)(4)(D) **Multiparty actions.** In multiparty actions, all parties opposing the expert
80 must agree on either a report or a deposition. If all parties opposing the expert do not
81 agree, then further discovery of the expert may be obtained only by deposition pursuant
82 to paragraph (a)(4)(B) and Rule 30.

83 (a)(4)(E) **Summary of non-retained expert testimony.** If a party intends to present
84 evidence at trial under Rules 702, 703, or 705 of the Utah Rules of Evidence from any
85 person other than an expert witness who is retained or specially employed to provide
86 testimony in the case or a person whose duties as an employee of the party regularly
87 involve giving expert testimony, that party must provide a written summary of the facts
88 and opinions to which the witness is expected to testify in accordance with the
89 deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not
90 exceed four hours.

91 (a)(5) **Pretrial disclosures.**

92 (a)(5)(A) A party shall, without waiting for a discovery request, provide to other
93 parties:

94 (a)(5)(A)(i) the name and, if not previously provided, the address and telephone
95 number of each witness, unless solely for impeachment, separately identifying
96 witnesses the party will call and witnesses the party may call;

97 (a) (5)(A)(ii) the name of witnesses whose testimony is expected to be presented by
98 transcript of a deposition and a copy of the transcript with the proposed testimony
99 designated; and

100 (a) (5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative
101 exhibits, unless solely for impeachment, separately identifying those which the party will
102 offer and those which the party may offer.

103 (a)(5)(B) Disclosure required by paragraph (a)(5) shall be made at least 28 days
104 before trial. At least 14 days before trial, a party shall serve and file counter-
105 designations of deposition testimony, objections and grounds for the objections to the
106 use of a deposition and to the admissibility of exhibits. Other than objections under
107 Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived
108 unless excused by the court for good cause.

109 (b) **Discovery scope.**

110 (b)(1) In general. Parties may discover any matter, not privileged, which is relevant
111 to the claim or defense of any party if the discovery satisfies the standards of
112 proportionality set forth below.

113 (b)(2) **Proportionality.** Discovery and discovery requests are proportional if:

114 (b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount
115 in controversy, the complexity of the case, the parties' resources, the importance of the
116 issues, and the importance of the discovery in resolving the issues;

117 (b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or
118 expense;

119 (b)(2)(C) the discovery is consistent with the overall case management and will
120 further the just, speedy and inexpensive determination of the case;

121 (b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

122 (b)(2)(E) the information cannot be obtained from another source that is more
123 convenient, less burdensome or less expensive; and

124 (b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the
125 information by discovery or otherwise, taking into account the parties' relative access to
126 the information.

127 (b)(3) **Burden.** The party seeking discovery always has the burden of showing
128 proportionality and relevance. To ensure proportionality, the court may enter orders
129 under Rule 37.

130 (b)(4) **Electronically stored information.** A party claiming that electronically stored
131 information is not reasonably accessible because of undue burden or cost shall
132 describe the source of the electronically stored information, the nature and extent of the
133 burden, the nature of the information not provided, and any other information that will
134 enable other parties to evaluate the claim.

135 (b)(5) **Trial preparation materials.** A party may obtain otherwise discoverable
136 documents and tangible things prepared in anticipation of litigation or for trial by or for
137 another party or by or for that other party's representative (including the party's attorney,
138 consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party
139 seeking discovery has substantial need of the materials and that the party is unable
140 without undue hardship to obtain substantially equivalent materials by other means. In
141 ordering discovery of such materials, the court shall protect against disclosure of the
142 mental impressions, conclusions, opinions, or legal theories of an attorney or other
143 representative of a party.

144 (b)(6) **Statement previously made about the action.** A party may obtain without
145 the showing required in paragraph (b)(5) a statement concerning the action or its
146 subject matter previously made by that party. Upon request, a person not a party may
147 obtain without the required showing a statement about the action or its subject matter
148 previously made by that person. If the request is refused, the person may move for a
149 court order under Rule 37. A statement previously made is (A) a written statement
150 signed or approved by the person making it, or (B) a stenographic, mechanical,
151 electronic, or other recording, or a transcription thereof, which is a substantially verbatim
152 recital of an oral statement by the person making it and contemporaneously recorded.

153 (b)(7) **Trial preparation; experts.**

154 (b)(7)(A) **Trial-preparation protection for draft reports or disclosures.** Paragraph
155 (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4),
156 regardless of the form in which the draft is recorded.

157 (b)(7)(B) **Trial-preparation protection for communications between a party's**
158 **attorney and expert witnesses.** Paragraph (b)(5) protects communications between
159 the party's attorney and any witness required to provide disclosures under paragraph
160 (a)(4), regardless of the form of the communications, except to the extent that the
161 communications:

162 (b)(7)(B)(i) relate to compensation for the expert's study or testimony;

163 (b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the
164 expert considered in forming the opinions to be expressed; or

165 (b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the
166 expert relied on in forming the opinions to be expressed.

167 (b)(7)(C) **Expert employed only for trial preparation.** Ordinarily, a party may not,
168 by interrogatories or otherwise, discover facts known or opinions held by an expert who
169 has been retained or specially employed by another party in anticipation of litigation or
170 to prepare for trial and who is not expected to be called as a witness at trial. A party
171 may do so only:

172 (b)(7)(C)(i) as provided in Rule 35(b); or

173 (b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for
174 the party to obtain facts or opinions on the same subject by other means.

175 (b)(8) **Claims of privilege or protection of trial preparation materials.**

176 (b)(8)(A) **Information withheld.** If a party withholds discoverable information by
177 claiming that it is privileged or prepared in anticipation of litigation or for trial, the party
178 shall make the claim expressly and shall describe the nature of the documents,
179 communications, or things not produced in a manner that, without revealing the
180 information itself, will enable other parties to evaluate the claim.

181 (b)(8)(B) **Information produced.** If a party produces information that the party claims
182 is privileged or prepared in anticipation of litigation or for trial, the producing party may
183 notify any receiving party of the claim and the basis for it. After being notified, a
184 receiving party must promptly return, sequester, or destroy the specified information and

185 any copies it has and may not use or disclose the information until the claim is resolved.
186 A receiving party may promptly present the information to the court under seal for a
187 determination of the claim. If the receiving party disclosed the information before being
188 notified, it must take reasonable steps to retrieve it. The producing party must preserve
189 the information until the claim is resolved.

190 (c) **Methods, sequence and timing of discovery; tiers; limits on standard**
191 **discovery; extraordinary discovery.**

192 (c)(1) **Methods of discovery.** Parties may obtain discovery by one or more of the
193 following methods: depositions upon oral examination or written questions; written
194 interrogatories; production of documents or things or permission to enter upon land or
195 other property, for inspection and other purposes; physical and mental examinations;
196 requests for admission; and subpoenas other than for a court hearing or trial.

197 (c)(2) **Sequence and timing of discovery.** Methods of discovery may be used in
198 any sequence, and the fact that a party is conducting discovery shall not delay any
199 other party's discovery. Except for cases exempt under paragraph (a)(3), a party may
200 not seek discovery from any source before that party's initial disclosure obligations are
201 satisfied.

202 (c)(3) **Definition of tiers for standard discovery.** Actions claiming \$50,000 or less
203 in damages are permitted standard discovery as described for Tier 1. Actions claiming
204 more than \$50,000 and less than \$300,000 in damages are permitted standard
205 discovery as described for Tier 2. Actions claiming \$300,000 or more in damages are
206 permitted standard discovery as described for Tier 3. Absent an accompanying damage
207 claim for more than \$300,000, actions claiming non-monetary relief are permitted
208 standard discovery as described for Tier 2.

209 (c)(4) **Definition of damages.** For purposes of determining standard discovery, the
210 amount of damages includes the total of all monetary damages sought (without
211 duplication for alternative theories) by all parties in all claims for relief in the original
212 pleadings.

213 (c)(5) **Limits on standard fact discovery.** Standard fact discovery per side
214 (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in
215 each tier is as follows. The days to complete standard fact discovery are calculated from

216 the date the first defendant's first disclosure is due and do not include expert discovery
 217 under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	\$50,000 or less	3	0	5	5	120
2	More than \$50,000 and less than \$300,000 or non-monetary relief	15	10	10	10	180
3	\$300,000 or more	30	20	20	20	210

218 (c)(6) **Extraordinary discovery.** To obtain discovery beyond the limits established
 219 in paragraph (c)(5), a party shall file:

220 (c)(6)(A) before the close of standard discovery and after reaching the limits of
 221 standard discovery imposed by these rules, a stipulated statement that extraordinary
 222 discovery is necessary and proportional under paragraph (b)(2) and that each party has
 223 reviewed and approved a discovery budget; or

224 (c)(6)(B) before the close of standard discovery and after reaching the limits of
 225 standard discovery imposed by these rules, a motion for extraordinary discovery setting
 226 forth the reasons why the extraordinary discovery is necessary and proportional under
 227 paragraph (b)(2) and certifying that the party has reviewed and approved a discovery
 228 budget and certifying that the party has in good faith conferred or attempted to confer
 229 with the other party in an effort to achieve a stipulation.

230 (d) **Requirements for disclosure or response; disclosure or response by an**
 231 **organization; failure to disclose; initial and supplemental disclosures and**
 232 **responses.**

233 (d)(1) A party shall make disclosures and responses to discovery based on the
 234 information then known or reasonably available to the party.

235 (d)(2) If the party providing disclosure or responding to discovery is a corporation,
 236 partnership, association, or governmental agency, the party shall act through one or
 237 more officers, directors, managing agents, or other persons, who shall make disclosures
 238 and responses to discovery based on the information then known or reasonably
 239 available to the party.

240 (d)(3) A party is not excused from making disclosures or responses because the
241 party has not completed investigating the case or because the party challenges the
242 sufficiency of another party's disclosures or responses or because another party has not
243 made disclosures or responses.

244 (d)(4) If a party fails to disclose or to supplement timely a disclosure or response to
245 discovery, that party may not use the undisclosed witness, document or material at any
246 hearing or trial unless the failure is harmless or the party shows good cause for the
247 failure.

248 (d)(5) If a party learns that a disclosure or response is incomplete or incorrect in
249 some important way, the party must timely provide the additional or correct information
250 if it has not been made known to the other parties. The supplemental disclosure or
251 response must state why the additional or correct information was not previously
252 provided.

253 (e) **Signing discovery requests, responses, and objections.** Every disclosure,
254 request for discovery, response to a request for discovery and objection to a request for
255 discovery shall be in writing and signed by at least one attorney of record or by the party
256 if the party is not represented. The signature of the attorney or party is a certification
257 under Rule 11. If a request or response is not signed, the receiving party does not need
258 to take any action with respect to it. If a certification is made in violation of the rule, the
259 court, upon motion or upon its own initiative, may take any action authorized by Rule 11
260 or Rule 37(e).

261 (f) **Filing.** Except as required by these rules or ordered by the court, a party shall not
262 file with the court a disclosure, a request for discovery or a response to a request for
263 discovery, but shall file only the certificate of service stating that the disclosure, request
264 for discovery or response has been served on the other parties and the date of service.

265 **Advisory Committee Notes**

266 **Disclosure requirements and timing. Rule 26(a)(1).** The 2011 amendments seek
267 to reduce discovery costs by requiring each party to produce, at an early stage in the
268 case, and without a discovery request, all of the documents and physical evidence the
269 party may offer in its case-in-chief and the names of witnesses the party may call in its
270 case-in-chief, with a description of their expected testimony. In this respect, the

271 amendments build on the initial disclosure requirements of the prior rules. In addition to
272 the disclosures required by the prior version of Rule 26(a)(1), a party must disclose
273 each fact witness the party may call in its case-in-chief and a summary of the witness's
274 expected testimony, a copy of all documents the party may offer in its case-in-chief, and
275 all documents to which a party refers in its pleadings.

276 Not all information will be known at the outset of a case. If discovery is serving its
277 proper purpose, additional witnesses, documents, and other information will be
278 identified. The scope and the level of detail required in the initial Rule 26(a)(1)
279 disclosures should be viewed in light of this reality. A party is not required to interview
280 every witness it ultimately may call at trial in order to provide a summary of the witness's
281 expected testimony. As the information becomes known, it should be disclosed. No
282 summaries are required for adverse parties, including management level employees of
283 business entities, because opposing lawyers are unable to interview them and their
284 testimony is available to their own counsel. For uncooperative or hostile witnesses any
285 summary of expected testimony would necessarily be limited to the subject areas the
286 witness is reasonably expected to testify about. For example, defense counsel may be
287 unable to interview a treating physician, so the initial summary may only disclose that
288 the witness will be questioned concerning the plaintiff's diagnosis, treatment and
289 prognosis. After medical records have been obtained, the summary may be expanded
290 or refined.

291 Subject to the foregoing qualifications, the summary of the witness's expected
292 testimony should be just that – a summary. The rule does not require prefiled testimony
293 or detailed descriptions of everything a witness might say at trial. On the other hand, it
294 requires more than the broad, conclusory statements that often were made under the
295 prior version of Rule 26(a)(1) (e.g., "The witness will testify about the events in question"
296 or "The witness will testify on causation."). The intent of this requirement is to give the
297 other side basic information concerning the subjects about which the witness is
298 expected to testify at trial, so that the other side may determine the witness's relative
299 importance in the case, whether the witness should be interviewed or deposed, and
300 whether additional documents or information concerning the witness should be sought.

301 This information is important because of the other discovery limits contained in the 2011
302 amendments, particularly the limits on depositions.

303 Likewise, the documents that should be provided as part of the Rule 26(a)(1)
304 disclosures are those that a party reasonably believes it may use at trial, understanding
305 that not all documents will be available at the outset of a case. In this regard, it is
306 important to remember that the duty to provide documents and witness information is a
307 continuing one, and disclosures must be promptly supplemented as new evidence and
308 witnesses become known as the case progresses.

309 The amendments also require parties to provide more information about damages
310 early in the case. Too often, the subject of damages is deferred until late in the case.
311 Early disclosure of damages information is important. Among other things, it is a critical
312 factor in determining proportionality. The committee recognizes that damages often
313 require additional discovery, and typically are the subject of expert testimony. The Rule
314 is not intended to require expert disclosures at the outset of a case. At the same time,
315 the subject of damages should not simply be deferred until expert discovery. Parties
316 should make a good faith attempt to compute damages to the extent it is possible to do
317 so and must in any event provide all discoverable information on the subject, including
318 materials related to the nature and extent of the damages.

319 The penalty for failing to make timely disclosures is that the evidence may not be
320 used in the party's case-in-chief. To make the disclosure requirement meaningful, and
321 to discourage sandbagging, parties must know that if they fail to disclose important
322 information that is helpful to their case, they will not be able to use that information at
323 trial. The courts will be expected to enforce them unless the failure is harmless or the
324 party shows good cause for the failure.

325 The 2011 amendments also change the time for making these required disclosures.
326 Because the plaintiff controls when it brings the action, plaintiffs must make their
327 disclosures within 14 days after service of the first answer. A defendant is required to
328 make its disclosures within 28 days after the plaintiff's first disclosure or after that
329 defendant's appearance, whichever is later. The purpose of early disclosure is to have
330 all parties present the evidence they expect to use to prove their claims or defenses,

331 thereby giving the opposing party the ability to better evaluate the case and determine
332 what additional discovery is necessary and proportional.

333 The time periods for making Rule 26(a)(1) disclosures, and the presumptive
334 deadlines for completing fact discovery, are keyed to the filing of an answer. If a
335 defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer,
336 these time periods normally would be not begin to run until that motion is resolved.

337 Finally, the 2011 amendments eliminate two categories of actions that previously
338 were exempt from the mandatory disclosure requirements. Specifically, the
339 amendments eliminate the prior exemption for contract actions in which the amount
340 claimed is \$20,000 or less, and actions in which any party is proceeding pro se. In the
341 committee's view, these types of actions will benefit from the early disclosure
342 requirements and the overall reduced cost of discovery.

343 **Expert disclosures and timing. Rule 26(a)(3).** Expert discovery has become an
344 ever-increasing component of discovery cost. The prior rules sought to eliminate some
345 of these costs by requiring the written disclosure of the expert's opinions and other
346 background information. However, because the expert was not required to sign these
347 disclosures, and because experts often were allowed to deviate from the opinions
348 disclosed, attorneys typically would take the expert's deposition to ensure the expert
349 would not offer "surprise" testimony at trial, thereby increasing rather than decreasing
350 the overall cost. The amendments seek to remedy this and other costs associated with
351 expert discovery by, among other things, allowing the opponent to choose either a
352 deposition of the expert or a written report, but not both; in the case of written reports,
353 requiring more comprehensive disclosures, signed by the expert, and making clear that
354 experts will not be allowed to testify beyond what is fairly disclosed in a report, all with
355 the goal of making reports a reliable substitute for depositions; and incorporating a rule
356 that protects from discovery most communications between an attorney and retained
357 expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and
358 parties are not required to serve interrogatories or use other discovery devices to obtain
359 this information.

360 Disclosures of expert testimony are made in sequence, with the party who bears the
361 burden of proof on the issue for which expert testimony will be offered going first. Within

362 seven days after the close of fact discovery, that party must disclose: (i) the expert's
363 curriculum vitae identifying the expert's qualifications, publications, and prior testimony;
364 (ii) compensation information; (iii) a brief summary of the opinions the expert will offer;
365 and (iv) a complete copy of the expert's file for the case. The file should include all of
366 the facts and data that the expert has relied upon in forming the expert's opinions. If the
367 expert has prepared summaries of data, spreadsheets, charts, tables, or similar
368 materials, they should be included. If the expert has used software programs to make
369 calculations or otherwise summarize or organize data, that information and underlying
370 formulas should be provided in native form so it can be analyzed and understood. To
371 the extent the expert is relying on depositions or materials produced in discovery, then a
372 list of the specific materials relied upon is sufficient. The committee recognizes that
373 experts frequently will prepare demonstrative exhibits or other aids to illustrate the
374 expert's testimony at trial, and the costs for preparing these materials can be
375 substantial. For that reason, these types of demonstrative aids may be prepared and
376 disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

377 Within seven days after this disclosure, the party opposing the retained expert may
378 elect either a deposition or a written report from the expert. A deposition is limited to
379 four hours, which is not included in the deposition hours under Rule 26(c)(5), and the
380 party taking it must pay the expert's hourly fee for attending the deposition. If a party
381 elects a written report, the expert must provide a signed report containing a complete
382 statement of all opinions the expert will express and the basis and reasons for them.
383 The intent is not to require a verbatim transcript of exactly what the expert will say at
384 trial; instead the expert must fairly disclose the substance of and basis for each opinion
385 the expert will offer. The expert may not testify in a party's case in chief concerning any
386 matter that is not fairly disclosed in the report. To achieve the goal of making reports a
387 reliable substitute for depositions, courts are expected to enforce this requirement. If a
388 party elects a deposition, rather than a report, it is up to the party to ask the necessary
389 questions to "lock in" the expert's testimony. But the expert is expected to be fully
390 prepared on all aspects of his/her trial testimony at the time of the deposition and may
391 not leave the door open for additional testimony by qualifying answers to deposition
392 questions.

393 The report or deposition must be completed within 28 days after the election is
394 made. After this, the party who does not bear the burden of proof on the issue for which
395 expert testimony is offered must make its corresponding disclosures and the opposing
396 party may then elect either a deposition or a written report. Under the deadlines
397 contained in the rules, expert discovery should take less than three months to complete.
398 However, as with the other discovery rules, these deadlines can be altered by
399 stipulation of the parties or order of the court.

400 The amendments also address the issue of testimony from non-retained experts,
401 such as treating physicians, police officers, or employees with special expertise, who
402 are not retained or specially employed to provide expert testimony, or whose duties as
403 an employee do not regularly involve giving expert testimony. This issue was
404 addressed by the Supreme Court in *Drew v. Lee*, 2011 UT 15, wherein the court held
405 that reports under the prior version of Rule 26(a)(3) are not required for treating
406 physicians.

407 There are a number of difficulties inherent in disclosing expert testimony that may be
408 offered from fact witnesses. First, there is often not a clear line between fact and expert
409 testimony. Many fact witnesses have scientific, technical or other specialized
410 knowledge, and their testimony about the events in question often will cross into the
411 area of expert testimony. The rules are not intended to erect artificial barriers to the
412 admissibility of such testimony. Second, many of these fact witnesses will not be within
413 the control of the party who plans to call them at trial. These witnesses may not be
414 cooperative, and may not be willing to discuss opinions they have with counsel. Where
415 this is the case, disclosures will necessarily be more limited. On the other hand,
416 consistent with the overall purpose of the 2011 amendments, a party should receive
417 advance notice if their opponent will solicit expert opinions from a particular witness so
418 they can plan their case accordingly. In an effort to strike an appropriate balance, the
419 rules require that such witnesses be identified and the information about their
420 anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii),
421 which should include any opinion testimony that a party expects to elicit from them at
422 trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii)
423 disclosures, that party is not required to prepare a separate Rule 26(a)(3)(D) disclosure

424 for the witness. And if that disclosure is made in advance of the witness's deposition,
425 those opinions should be explored in the deposition and not in a separate expert
426 deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the
427 same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the
428 party has the burden of proof or is responding to another expert. Rule 26(a)(3)(D) and
429 26(a)(1)(A)(ii) are not intended to elevate form over substance – all they require is that a
430 party fairly inform its opponent that opinion testimony may be offered from a particular
431 witness. And because a party who expects to offer this testimony normally cannot
432 compel such a witness to prepare a written report, further discovery must be done by
433 interview or by deposition.

434 Finally, the amendments include a new Rule 26(b)(7) that protects from discovery
435 draft expert reports and, with limited exception, communications between an attorney
436 and an expert. These changes are modeled after the recent changes to the Federal
437 Rules of Civil Procedure and are intended to address the unnecessary and costly
438 procedures that often were employed in order to protect such information from
439 discovery, and to reduce “satellite litigation” over such issues.

440 **Scope of discovery—Proportionality. Rule 26(b).** Proportionality is the principle
441 governing the scope of discovery. Simply stated, it means that the cost of discovery
442 should be proportional to what is at stake in the litigation.

443 In the past, the scope of discovery was governed by “relevance” or the “likelihood to
444 lead to discovery of admissible evidence.” These broad standards may have secured
445 just results by allowing a party to discover all facts relevant to the litigation. However,
446 they did little to advance two equally important objectives of the rules of civil
447 procedure—the speedy and inexpensive resolution of every action. Accordingly, the
448 former standards governing the scope of discovery have been replaced with the
449 proportionality standards in subpart (b)(1).

450 The concept of proportionality is not new. The prior rule permitted the Court to limit
451 discovery methods if it determined that “the discovery was unduly burdensome or
452 expensive, taking into account the needs of the case, the amount in controversy,
453 limitations on the parties’ resources, and the importance of the issues at stake in the
454 litigation.” The Federal Rules of Civil Procedure contains a similar provision. See Fed.

455 R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked
456 either under the Utah rules or federal rules.

457 Under the prior rule, the party objecting to the discovery request had the burden of
458 proving that a discovery request was not proportional. The new rule changes the burden
459 of proof. Today, the party seeking discovery beyond the scope of “standard” discovery
460 has the burden of showing that the request is “relevant to the claim or defense of any
461 party” and that the request satisfies the standards of proportionality. As before, ultimate
462 admissibility is not an appropriate objection to a discovery request so long as the
463 proportionality standard and other requirements are met.

464 The 2011 amendments establish three tiers of standard discovery in Rule 26(c).
465 Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules
466 should limit the need to resort to judicial oversight. Tiered standard discovery seeks to
467 achieve these ends. The “one-size-fits-all” system is rejected. Tiered discovery signals
468 to judges, attorneys, and parties the amount of discovery which by rule is deemed
469 proportional for cases with different amounts in controversy.

470 Any system of rules which permits the facts and circumstances of each case to
471 inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad
472 discretion in deciding whether a discovery request is proportional. The proportionality
473 standards in subpart (b)(2) and the discovery tiers in subpart (c) mitigate uncertainty by
474 guiding that discretion. The proper application of the proportionality standards will be
475 defined over time by trial and appellate courts.

476 **Standard and extraordinary discovery. Rule 26(c).** As a counterpart to requiring
477 more detailed disclosures under Rule 26(a), the 2011 amendments place new
478 limitations on additional discovery the parties may conduct. Because the committee
479 expects the enhanced disclosure requirements will automatically permit each party to
480 learn the witnesses and evidence the opposing side will offer in its case-in-chief,
481 additional discovery should serve the more limited function of permitting parties to find
482 witnesses, documents, and other evidentiary materials that are harmful, rather than
483 helpful, to the opponent’s case.

484 Rule 26(c) provides for three separate “tiers” of limited, “standard” discovery that are
485 presumed to be proportional to the amount and issues in controversy in the action, and

486 that the parties may conduct as a matter of right. An aggregation of all damages sought
487 by all parties in an action dictates the applicable tier of standard discovery, whether
488 such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers
489 of standard discovery are set forth in a chart that is embedded in the body of the rule
490 itself. “Tier 1” describes a minimal amount of standard discovery that is presumed
491 proportional for cases involving damages of \$50,000 or less. “Tier 2” sets forth larger
492 limits on standard discovery that are applicable in cases involving damages above
493 \$50,000 but less than \$300,000. Finally, “Tier 3” prescribes still greater standard
494 discovery for actions involving damages in excess of \$300,000. Deposition hours are
495 charged to a side for the time spent asking questions of the witness. In a particular
496 deposition, one side may use two hours while the other side uses only 30 minutes. The
497 tiers also provide presumptive limitations on the time within which standard discovery
498 should be completed, which limitations similarly increase with the amount of damages at
499 issue. Discovery motions will not toll the period. Parties are expected to be reasonable
500 and accomplish as much as they can during standard discovery. The motions may
501 result in additional discovery and sanctions at the expense of a party who unreasonably
502 fails to respond or otherwise frustrates discovery. After the expiration of the applicable
503 time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief,
504 such as injunctive relief, are subject to the standard discovery limitations of Tier 2,
505 absent an accompanying monetary claim of \$300,000 or more, in which case Tier 3
506 applies. The committee determined these standard discovery limitations based on the
507 expectation that for the majority of cases filed in the Utah State Courts, the magnitude
508 of available discovery and applicable time parameters available under the three-tiered
509 system should be sufficient for cases involving the respective amounts of damages.

510 Despite the expectation that standard discovery according to the applicable tier
511 should be adequate in the typical case, the 2011 amendments contemplate there will be
512 some cases for which standard discovery is not sufficient or appropriate. In such cases,
513 parties may conduct additional discovery that is shown to be consistent with the
514 principle of proportionality. There are two ways to obtain such additional discovery. The
515 first is by stipulation. If the parties can agree additional discovery is necessary, they
516 may stipulate to as much additional discovery as they desire, provided they stipulate the

517 additional discovery is proportional to what is at stake in the litigation and counsel for
518 each party certifies that the party has reviewed and approved a budget for additional
519 discovery. Such a stipulation should be filed before the close of the standard discovery
520 time limit, but only after reaching the limits for that type of standard discovery available
521 under the rule. If these conditions are met, the Court will not second-guess the parties
522 and their counsel and must approve the stipulation.

523 The second method to obtain additional discovery is by motion. The committee
524 recognizes there will be some cases in which additional discovery is appropriate, but the
525 parties cannot agree to the scope of such additional discovery. These may include,
526 among other categories, large and factually complex cases and cases in which there is
527 a significant disparity in the parties' access to information, such that one party
528 legitimately has a greater need than the other party for additional discovery in order to
529 prepare properly for trial. To prevent a party from taking advantage of this situation, the
530 2011 amendments allow any party to move the Court for additional discovery. As with
531 stipulations for extraordinary discovery, a party filing a motion for extraordinary
532 discovery should do so before the close of the standard discovery time limit, but only
533 after the moving party has reached the limits for that type of standard discovery
534 available to it under the rule. By taking advantage of this discovery, counsel should be
535 better equipped to articulate for the court what additional discovery is needed and why.
536 The party making such a motion must demonstrate that the additional discovery is
537 proportional and certify that the party has reviewed and approved a discovery budget.
538 The burden to show the need for additional discovery, and to demonstrate relevance
539 and proportionality, always falls on the party seeking additional discovery. However,
540 cases in which such additional discovery is appropriate do exist, and it is important for
541 courts to recognize they can and should permit additional discovery in appropriate
542 cases, commensurate with the complexity and magnitude of the dispute.

543 **Protective order language moved to Rule 37.** The 2011 amendments delete in its
544 entirety the prior language of Rule 26(c) governing motions for protective orders. The
545 substance of that language is now found in Rule 37. The committee determined it was
546 preferable to cover motions to compel, motions for protective orders, and motions for

547 discovery sanctions in a single rule, rather than two separate rules. Accordingly, Rule
548 37 now governs these motions and orders.

549 **Consequences of failure to disclose.** Rule 26(d). If a party fails to disclose or to
550 supplement timely its discovery responses, that party cannot use the undisclosed
551 witness, document, or material at any hearing or trial, absent proof that non-disclosure
552 was harmless or justified by good cause. More complete disclosures increase the
553 likelihood that the case will be resolved justly, speedily, and inexpensively. Not being
554 able to use evidence that a party fails properly to disclose provides a powerful incentive
555 to make complete disclosures. This is true only if trial courts hold parties to this
556 standard. Accordingly, although a trial court retains discretion to determine how properly
557 to address this issue in a given case, the usual and expected result should be exclusion
558 of the evidence.
559

1 **Rule 26.1. Disclosure and discovery in domestic relations actions.**

2 (a) **Scope.** This rule applies to the following domestic relations actions: divorce;
3 temporary separation; separate maintenance; parentage; custody; child support; and
4 modification. This rule does not apply to adoptions, enforcement of prior orders,
5 cohabitant abuse protective orders, child protective orders, civil stalking injunctions, or
6 grandparent visitation.

7 (b) **Time for disclosure.** In addition to the disclosures required in Rule 26, in all
8 domestic relations actions, the documents required in this rule shall be disclosed by the
9 petitioner within 14 days after service of the first answer to the complaint and by the
10 respondent within 28 days after the petitioner's first disclosure or 28 days after that
11 respondent's appearance, whichever is later.

12 (c) **Financial declaration.** Each party shall disclose to all other parties a fully
13 completed court-approved Financial Declaration and attachments. Each party shall
14 attach to the Financial Declaration the following:

15 (c)(1) For every item and amount listed in the Financial Declaration, excluding
16 monthly expenses, the producing party shall attach copies of statements verifying the
17 amounts listed on the Financial Declaration that are reasonably available to the party.

18 (c)(2) For the two tax years before the petition was filed, complete federal and state
19 income tax returns, including Form W-2 and supporting tax schedules and attachments,
20 filed by or on behalf of that party or by or on behalf of any entity in which the party has a
21 majority or controlling interest, including, but not limited to, Form 1099 and Form K-1
22 with respect to that party.

23 (c)(3) Pay stubs and other evidence of all earned and un-earned income for the 12
24 months before the petition was filed.

25 (c)(4) All loan applications and financial statements prepared or used by the party
26 within the 12 months before the petition was filed.

27 (c)(5) Documents verifying the value of all real estate in which the party has an
28 interest, including, but not limited to, the most recent appraisal, tax valuation and
29 refinance documents.

30 (c)(6) All statements for the 3 months before the petition was filed for all financial
31 accounts, including, but not limited to checking, savings, money market funds,

32 certificates of deposit, brokerage, investment, retirement, regardless of whether the
33 account has been closed including those held in that party's name, jointly with another
34 person or entity, or as a trustee or guardian, or in someone else's name on that party's
35 behalf.

36 (c)(7) If the foregoing documents are not reasonably available or are in the
37 possession of the other party, the party disclosing the Financial Declaration shall
38 estimate the amounts entered on the Financial Declaration, the basis for the estimation
39 and an explanation why the documents are not available.

40 (d) **Certificate of service.** Each party shall file a Certificate of Service with the court
41 certifying that he or she has provided the Financial Declaration and attachments to the
42 other party in compliance with this rule.

43 (e) **Exempted agencies.** Agencies of the State of Utah are not subject to these
44 disclosure requirements.

45 (f) **Sanctions.** Failure to fully disclose all assets and income in the Financial
46 Declaration and attachments may subject the non-disclosing party to sanctions under
47 Rule 37 including an award of non-disclosed assets to the other party, attorney's fees or
48 other sanctions deemed appropriate by the court.

49 (g) **Failure to comply.** Failure of a party to comply with this rule does not preclude
50 any other party from obtaining a default judgment, proceeding with the case, or seeking
51 other relief from the court.

52 (h) **Notice of requirements.** Notice of the requirements of this rule shall be served
53 on the Respondent and all joined parties with the initial petition.

54 **Advisory Committee Note**

55 Proposed Rule 26A was developed by the Family Law Section of the Utah State Bar.
56 It represents the type of discovery or disclosure rule that the advisory committee
57 anticipated when drafting proposed Rule 26(a).

58

1 **Rule 29. Stipulations regarding disclosure and discovery procedure.**

2 The parties may modify the limits and procedures for disclosure and discovery by
3 filing, before the close of standard discovery and after reaching the limits of standard
4 discovery imposed by these rules, a stipulated statement that the extraordinary
5 discovery is necessary and proportional under Rule 26(b)(2) and that each party has
6 reviewed and approved a discovery budget. Stipulations extending the time for
7 disclosure or discovery do not require a statement regarding proportionality or discovery
8 budgets. Stipulations extending the time for or limits of disclosure or discovery require
9 court approval only if the extension would interfere with a court order for completion of
10 discovery or with the date of a hearing or trial.

11

1 **Rule 30. Depositions upon oral questions.**

2 (a) **When depositions may be taken; when leave required.** A party may depose a
3 party or witness by oral questions. A witness may not be deposed more than once in
4 standard discovery. An expert who has prepared a report disclosed under Rule
5 26(a)(3)(B) may not be deposed.

6 (b) **Notice of deposition; general requirements; special notice; non-**
7 **stenographic recording; production of documents and things; deposition of**
8 **organization; deposition by telephone.**

9 (b)(1) The party deposing a witness shall give reasonable notice in writing to every
10 other party. The notice shall state the date, time and place for the deposition and the
11 name and address of each witness. If the name of a witness is not known, the notice
12 shall describe the witness sufficiently to identify the person or state the class or group to
13 which the person belongs. The notice shall designate any documents and tangible
14 things to be produced by a witness. The notice shall designate the officer who will
15 conduct the deposition.

16 (b)(2) The notice shall designate the method by which the deposition will be
17 recorded. With prior notice to the officer, witness and other parties, any party may
18 designate a recording method in addition to the method designated in the notice.
19 Depositions may be recorded by sound, sound-and-visual, or stenographic means, and
20 the party designating the recording method shall bear the cost of the recording. The
21 appearance or demeanor of witnesses or attorneys shall not be distorted through
22 recording techniques.

23 (b)(3) A deposition shall be conducted before an officer appointed or designated
24 under Rule 28 and shall begin with a statement on the record by the officer that includes
25 (A) the officer's name and business address; (B) the date, time and place of the
26 deposition; (C) the name of the witness; (D) the administration of the oath or affirmation
27 to the witness; and (E) an identification of all persons present. If the deposition is
28 recorded other than stenographically, the officer shall repeat items (A) through (C) at
29 the beginning of each unit of the recording medium. At the end of the deposition, the
30 officer shall state on the record that the deposition is complete and shall state any
31 stipulations.

32 (b)(4) The notice to a party witness may be accompanied by a request under Rule
33 34 for the production of documents and tangible things at the deposition. The procedure
34 of Rule 34 shall apply to the request. The attendance of a nonparty witness may be
35 compelled by subpoena under Rule 45. Documents and tangible things to be produced
36 shall be stated in the subpoena.

37 (b)(5) A deposition may be taken by remote electronic means. A deposition taken by
38 remote electronic means is considered to be taken at the place where the witness is
39 located.

40 (b)(6) A party may name as the witness a corporation, a partnership, an association,
41 or a governmental agency, describe with reasonable particularity the matters on which
42 questioning is requested, and direct the organization to designate one or more officers,
43 directors, managing agents, or other persons to testify on its behalf. The organization
44 shall state, for each person designated, the matters on which the person will testify. A
45 subpoena shall advise a nonparty organization of its duty to make such a designation.
46 The person so designated shall testify as to matters known or reasonably available to
47 the organization.

48 (c) **Examination and cross-examination; objections.**

49 (c)(1) Questioning of witnesses may proceed as permitted at the trial under the Utah
50 Rules of Evidence, except Rules 103 and 615.

51 (c)(2) All objections shall be recorded, but the questioning shall proceed, and the
52 testimony taken subject to the objections. Any objection shall be stated concisely and in
53 a non-argumentative and non-suggestive manner. A person may instruct a witness not
54 to answer only to preserve a privilege, to enforce a limitation on evidence directed by
55 the court, or to present a motion for a protective order under Rule 37. Upon demand of
56 the objecting party or witness, the deposition shall be suspended for the time necessary
57 to make a motion. The party taking the deposition may complete or adjourn the
58 deposition before moving for an order to compel discovery under Rule 37.

59 (d) **Limits.** During standard discovery, oral questioning of a nonparty shall not
60 exceed four hours, and oral questioning of a party shall not exceed seven hours.

61 (e) **Submission to witness; changes; signing.** Within 28 days after being notified
62 by the officer that the transcript or recording is available, a witness may sign a

63 statement of changes to the form or substance of the transcript or recording and the
64 reasons for the changes. The officer shall append any changes timely made by the
65 witness.

66 (f) **Record of deposition; certification and delivery by officer; exhibits; copies.**

67 (f)(1) The officer shall record the deposition or direct another person present to
68 record the deposition. The officer shall sign a certificate, to accompany the record, that
69 the witness was under oath or affirmation and that the record is a true record of the
70 deposition. The officer shall keep a copy of the record. The officer shall securely seal
71 the record endorsed with the title of the action and marked "Deposition of (name). Do
72 not open." and shall promptly send the sealed record to the attorney or the party who
73 designated the recording method. An attorney or party receiving the record shall store it
74 under conditions that will protect it against loss, destruction, tampering, or deterioration.

75 (f)(2) Every party may inspect and copy documents and things produced for
76 inspection and must have a fair opportunity to compare copies and originals. Upon the
77 request of a party, documents and things produced for inspection shall be marked for
78 identification and added to the record. If the witness wants to retain the originals, that
79 person shall offer the originals to be copied, marked for identification and added to the
80 record.

81 (f)(3) Upon payment of reasonable charges, the officer shall furnish a copy of the
82 record to any party or to the witness. An official transcript of a recording made by non-
83 stenographic means shall be prepared under Utah Rule of Appellate Procedure 11(e).

84 (g) **Failure to attend or to serve subpoena; expenses.** If the party giving the
85 notice of a deposition fails to attend or fails to serve a subpoena upon a witness who
86 fails to attend, and another party attends in person or by attorney, the court may order
87 the party giving the notice to pay to the other party the reasonable costs, expenses and
88 attorney fees incurred.

89 (h) **Deposition in action pending in another state.** Any party to an action in
90 another state may take the deposition of any person within this state in the same
91 manner and subject to the same conditions and limitations as if such action were
92 pending in this state. Notice of the deposition shall be filed with the clerk of the court of
93 the county in which the person whose deposition is to be taken resides or is to be

94 served. Matters required to be submitted to the court shall be submitted to the court in
95 the county where the deposition is being taken.

96 (i) **Stipulations regarding deposition procedures.** The parties may by written
97 stipulation provide that depositions may be taken before any person, at any time or
98 place, upon any notice, and in any manner and when so taken may be used like other
99 depositions.

100

1 **Rule 31. Depositions upon written questions.**

2 (a) A party may depose a party or witness by written questions. Rules 30 and 45
3 apply to depositions upon written questions, except insofar as by their nature they are
4 clearly inapplicable.

5 (b) A party taking a deposition using written questions shall serve on the parties a
6 notice which includes the name or description and address of the deponent, the name
7 or descriptive title of the officer before whom the deposition will be taken, and the
8 questions to be asked.

9 (c) Within 14 days after the questions are served, a party may serve cross
10 questions. Within 7 days after being served with cross questions, a party may serve
11 redirect questions. Within 7 days after being served with redirect questions, a party may
12 serve re-cross questions.

13 (d) A copy of the notice and copies of all questions served shall be delivered by the
14 party taking the deposition to the designated officer who shall proceed promptly to ask
15 the questions and prepare a record of the responses.

16 (e) During standard discovery, a deposition by written questioning shall not
17 cumulatively exceed 15 questions, including discrete subparts, by the plaintiffs
18 collectively, by the defendants collectively or by third-party defendants collectively.
19

1 **Rule 33. Interrogatories to parties.**

2 **(a) Availability; procedures for use.** During standard discovery, any party may
3 serve written interrogatories upon any other party, subject to the limits of Rule 26(c)(5).
4 Each interrogatory shall be separately stated and numbered.

5 **(b) Answers and objections.** The responding party shall serve a written response
6 within 28 days after service of the interrogatories. The responding party shall restate
7 each interrogatory before responding to it. Each interrogatory shall be answered
8 separately and fully in writing under oath or affirmation, unless it is objected to. If an
9 interrogatory is objected to, the party shall state the reasons for the objection. Any
10 reason not stated is waived unless excused by the court for good cause. An
11 interrogatory is not objectionable merely because an answer involves an opinion or
12 argument that relates to fact or the application of law to fact. The party shall answer any
13 part of an interrogatory that is not objectionable.

14 **(c) Scope; use at trial.** Interrogatories may relate to any discoverable matter.
15 Answers may be used as permitted by the Rules of Evidence.

16 **(d) Option to produce business records.** If the answer to an interrogatory may be
17 found by inspecting the answering party's business records, including electronically
18 stored information, and the burden of finding the answer is substantially the same for
19 both parties, the answering party may identify the records from which the answer may
20 be found. The answering party must give the asking party reasonable opportunity to
21 inspect the records and to make copies, compilations, or summaries. The answering
22 party must identify the records in sufficient detail to permit the asking party to locate and
23 to identify them as readily as the answering party.

24

1 **Rule 34. Production of documents and things and entry upon land for**
2 **inspection and other purposes.**

3 (a) **Scope.**

4 (a)(1) Any party may serve on any other party a request to produce and permit the
5 requesting party to inspect, copy, test or sample any designated discoverable
6 documents, electronically stored information or tangible things (including writings,
7 drawings, graphs, charts, photographs, sound recordings, images, and other data or
8 data compilations stored in any medium from which information can be obtained,
9 translated, if necessary, by the respondent into reasonably usable form) in the
10 possession or control of the responding party.

11 (a)(2) Any party may serve on any other party a request to permit entry upon
12 designated property in the possession or control of the responding party for the purpose
13 of inspecting, measuring, surveying, photographing, testing, or sampling the property or
14 any designated discoverable object or operation on the property.

15 (b) **Procedure and limitations.**

16 (b)(1) The request shall identify the items to be inspected by individual item or by
17 category, and describe each item and category with reasonable particularity. The
18 request shall specify a reasonable date, time, place, and manner of making the
19 inspection and performing the related acts. The request may specify the form or forms
20 in which electronically stored information is to be produced.

21 (b)(2) The responding party shall serve a written response within 28 days after
22 service of the request. The responding party shall restate each request before
23 responding to it. The response shall state, with respect to each item or category, that
24 inspection and related acts will be permitted as requested, or that the request is
25 objected to. If the party objects to a request, the party must state the reasons for the
26 objection. Any reason not stated is waived unless excused by the court for good cause.
27 The party shall identify and permit inspection of any part of a request that is not
28 objectionable. If the party objects to the requested form or forms for producing
29 electronically stored information -- or if no form was specified in the request -- the
30 responding party must state the form or forms it intends to use.

31 (c) **Form of documents and electronically stored information.**

32 (c)(1) A party who produces documents for inspection shall produce them as they
33 are kept in the usual course of business or shall organize and label them to correspond
34 with the categories in the request.

35 (c)(2) If a request does not specify the form or forms for producing electronically
36 stored information, a responding party must produce the information in a form or forms
37 in which it is ordinarily maintained or in a form or forms that are reasonably usable.

38 (c)(3) A party need not produce the same electronically stored information in more
39 than one form.

40

1 **Rule 35. Physical and mental examination of persons.**

2 (a) **Order for examination.** When the mental or physical condition or attribute of a
3 party or of a person in the custody or control of a party is in controversy, the court may
4 order the party to submit to a physical or mental examination by a suitably licensed or
5 certified examiner or to produce for examination the person in the party's custody or
6 control. The order may be made only on motion for good cause shown. All papers
7 related to the motion and notice of any hearing shall be served on a nonparty to be
8 examined. The order shall specify the time, place, manner, conditions, and scope of the
9 examination and the person by whom the examination is to be made. The person being
10 examined may record the examination by audio or video means unless the party
11 requesting the examination shows that the recording would unduly interfere with the
12 examination.

13 (b) **Report.** The party requesting the examination shall disclose a detailed written
14 report of the examiner, setting out the examiner's findings, including results of all tests
15 made, diagnoses and conclusions. If the party requesting the examination wishes to call
16 the examiner as a witness, the party shall disclose the examiner as an expert as
17 required by Rule 26(a)(3).

18 (c) **Sanctions.** If a party or a person in the custody or under the legal control of a
19 party fails to obey an order entered under paragraph (a), the court on motion may take
20 any action authorized by Rule 37(e), except that the failure cannot be treated as
21 contempt of court.

22 **Advisory Committee Notes**

23 Rule 35 has been substantially revised. A medical examination is not a matter of
24 right, but should only be permitted by the trial court upon a showing of good cause. Rule
25 35 has always provided, and still provides, that the proponent of an examination must
26 demonstrate good cause for the examination. And, as before, the motion and order
27 should detail the specifics of the proposed examination.

28 The parties and the trial court should refrain from the use of the phrase "independent
29 medical examiner," using instead the neutral appellation "medical examiner," "Rule 35
30 examiner," or the like.

31 The Committee has determined that the benefits of recording generally outweigh the
32 downsides in a typical case. The amended rule therefore provides that recording shall
33 be permitted as a matter of course unless the person moving for the examination
34 demonstrates the recording would unduly interfere with the examination.

35 Nothing in the rule requires that the recording be conducted by a professional, and it
36 is not the intent of the committee that this extra cost should be necessary. The
37 committee also recognizes that recording may require the presence of a third party to
38 manage the recording equipment, but this must be done without interference and as
39 unobtrusively as possible.

40 The former requirement of Rule 35(c) providing for the production of prior reports on
41 other examinees by the examiner was a source of great confusion and controversy. It is
42 the Committee's view that this provision is better eliminated, and in the amended rule
43 there is no longer an automatic requirement for the production of prior reports of other
44 examinations. Medical examiners will be treated as other expert witnesses are treated,
45 with the required disclosure under Rule 26 and the option of a report or a deposition.

46

1 **Rule 36. Request for admission.**

2 (a) **Request for admission.** A party may serve upon any other party a written
3 request to admit the truth of any discoverable matter set forth in the request, including
4 the genuineness of any document. The matter must relate to statements or opinions of
5 fact or of the application of law to fact. Each matter shall be separately stated and
6 numbered. A copy of the document shall be served with the request unless it has
7 already been furnished or made available for inspection and copying. The request shall
8 notify the responding party that the matters will be deemed admitted unless the party
9 responds within 28 days after service of the request.

10 (b) **Answer or objection.**

11 (b)(1) The matter is admitted unless, within 28 days after service of the request, the
12 responding party serves upon the requesting party a written response.

13 (b)(2) The answering party shall restate each request before responding to it. Unless
14 the answering party objects to a matter, the party must admit or deny the matter or state
15 in detail the reasons why the party cannot truthfully admit or deny. A party may identify
16 the part of a matter which is true and deny the rest. A denial shall fairly meet the
17 substance of the request. Lack of information is not a reason for failure to admit or deny
18 unless, after reasonable inquiry, the information known or reasonably available is
19 insufficient to enable an admission or denial. A party who considers the subject of a
20 request for admission to be a genuine issue for trial may not object on that ground alone
21 but may, subject to Rule 37(f), deny the matter or state the reasons for the failure to
22 admit or deny.

23 (b)(3) If the party objects to a matter, the party shall state the reasons for the
24 objection. Any reason not stated is waived unless excused by the court for good cause.
25 The party shall admit or deny any part of a matter that is not objectionable. It is not
26 grounds for objection that the truth of a matter is a genuine issue for trial.

27 (c) **Effect of admission.** Any matter admitted under this rule is conclusively
28 established unless the court on motion permits withdrawal or amendment of the
29 admission. The court may permit withdrawal or amendment if the presentation of the
30 merits of the action will be promoted and withdrawal or amendment will not prejudice
31 the requesting party. Any admission under this rule is for the purpose of the pending

32 action only. It is not an admission for any other purpose, nor may it be used in any other
33 action.

34

1 **Rule 37. Discovery and disclosure motions; Sanctions.**

2 **(a) Motion for order compelling disclosure or discovery.**

3 (a)(1) A party may move to compel disclosure or discovery and for appropriate
4 sanctions if another party:

5 (a)(1)(A) fails to disclose, fails to respond to a discovery request, or makes an
6 evasive or incomplete disclosure or response to a request for discovery;

7 (a)(1)(B) fails to disclose, fails to respond to a discovery request, fails to supplement
8 a disclosure or response or makes a supplemental disclosure or response without an
9 adequate explanation of why the additional or correct information was not previously
10 provided;

11 (a)(1)(C) objects to a discovery request ;

12 (a)(1)(D) impedes, delays, or frustrates the fair examination of a witness; or

13 (a)(1)(E) otherwise fails to make full and complete disclosure or discovery.

14 (a)(2) A motion may be made to the court in which the action is pending, or, on
15 matters relating to a deposition or a document subpoena, to the court in the district
16 where the deposition is being taken or where the subpoena was served. A motion for an
17 order to a nonparty witness shall be made to the court in the district where the
18 deposition is being taken or where the subpoena was served.

19 (a)(3) The moving party must attach a copy of the request for discovery, the
20 disclosure, or the response at issue. The moving party must also attach a certification
21 that the moving party has in good faith conferred or attempted to confer with the other
22 affected parties in an effort to secure the disclosure or discovery without court action
23 and that the discovery being sought is proportional under Rule 26(b)(2).

24 **(b) Motion for protective order.**

25 (b)(1) A party or the person from whom discovery is sought may move for an order
26 of protection from discovery. The moving party shall attach to the motion a copy of the
27 request for discovery or the response at issue. The moving party shall also attach a
28 certification that the moving party has in good faith conferred or attempted to confer with
29 other affected parties to resolve the dispute without court action.

30 (b)(2) If the motion raises issues of proportionality under Rule 26(b)(2), the party
31 seeking the discovery has the burden of demonstrating that the information being
32 sought is proportional.

33 (c) **Orders.** The court may make any order to require disclosure or discovery or to
34 protect a party or person from discovery being conducted in bad faith or from
35 annoyance, embarrassment, oppression, or undue burden or expense, or to achieve
36 proportionality under Rule 26(b)(2), including one or more of the following:

37 (c)(1) that the discovery not be had;

38 (c)(2) that the discovery may be had only on specified terms and conditions,
39 including a designation of the time or place;

40 (c)(3) that the discovery may be had only by a method of discovery other than that
41 selected by the party seeking discovery;

42 (c)(4) that certain matters not be inquired into, or that the scope of the discovery be
43 limited to certain matters;

44 (c)(5) that discovery be conducted with no one present except persons designated
45 by the court;

46 (c)(6) that a deposition after being sealed be opened only by order of the court;

47 (c)(7) that a trade secret or other confidential research, development, or commercial
48 information not be disclosed or be disclosed only in a designated way;

49 (c)(8) that the parties simultaneously file specified documents or information
50 enclosed in sealed envelopes to be opened as directed by the court;

51 (c)(9) that a question about a statement or opinion of fact or the application of law to
52 fact not be answered until after designated discovery has been completed or until a
53 pretrial conference or other later time; or

54 (c)(10) that the costs, expenses and attorney fees of discovery be allocated among
55 the parties as justice requires.

56 (c)(11) If a protective order terminates a deposition, it shall be resumed only upon
57 the order of the court in which the action is pending.

58 (d) **Expenses and sanctions for motions.** If the motion to compel or for a
59 protective order is granted, or if a party provides disclosure or discovery or withdraws a
60 disclosure or discovery request after a motion is filed, the court may order the party,

61 witness or attorney to pay the reasonable expenses and attorney fees incurred on
62 account of the motion if the court finds that the party, witness, or attorney did not act in
63 good faith or asserted a position that was not substantially justified. A motion to compel
64 or for a protective order does not suspend or toll the time to complete standard
65 discovery.

66 (e) **Failure to comply with order.**

67 (e)(1) Sanctions by court in district where deposition is taken. Failure to follow an
68 order of the court in the district in which the deposition is being taken or where the
69 document subpoena was served is contempt of that court.

70 (e)(2) Sanctions by court in which action is pending. Unless the court finds that the
71 failure was substantially justified, the court in which the action is pending may impose
72 appropriate sanctions for the failure to follow its orders, including the following:

73 (e)(2)(A) deem the matter or any other designated facts to be established in
74 accordance with the claim or defense of the party obtaining the order;

75 (e)(2)(B) prohibit the disobedient party from supporting or opposing designated
76 claims or defenses or from introducing designated matters into evidence;

77 (e)(2)(C) stay further proceedings until the order is obeyed;

78 (e)(2)(D) dismiss all or part of the action, strike all or part of the pleadings, or render
79 judgment by default on all or part of the action;

80 (e)(2)(E) order the party or the attorney to pay the reasonable expenses, including
81 attorney fees, caused by the failure;

82 (e)(2)(F) treat the failure to obey an order, other than an order to submit to a physical
83 or mental examination, as contempt of court; and

84 (e)(2)(G) instruct the jury regarding an adverse inference.

85 (f) **Expenses on failure to admit.** If a party fails to admit the genuineness of any
86 document or the truth of any matter as requested under Rule 36, and if the party
87 requesting the admissions proves the genuineness of the document or the truth of the
88 matter, the party requesting the admissions may apply to the court for an order requiring
89 the other party to pay the reasonable expenses incurred in making that proof, including
90 reasonable attorney fees. The court shall make the order unless it finds that:

91 (f)(1) the request was held objectionable pursuant to Rule 36(a);

92 (f)(2) the admission sought was of no substantial importance;

93 (f)(3) there were reasonable grounds to believe that the party failing to admit might
94 prevail on the matter;

95 (f)(4) that the request is not proportional under Rule 26(b)(2); or

96 (f)(5) there were other good reasons for the failure to admit.

97 (g) **Failure of party to attend at own deposition.** The court on motion may take
98 any action authorized by paragraph (e)(2) if a party or an officer, director, or managing
99 agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf
100 of a party fails to appear before the officer taking the deposition, after proper service of
101 the notice. The failure to act described in this paragraph may not be excused on the
102 ground that the discovery sought is objectionable unless the party failing to act has
103 applied for a protective order under paragraph (b).

104 (h) **Failure to disclose.** If a party fails to disclose a witness, document or other
105 material as required by Rule 26(a) or Rule 26(d)(1), or to amend a prior response to
106 discovery as required by Rule 26(d)(4), that party shall not be permitted to use the
107 witness, document or other material at any hearing unless the failure to disclose is
108 harmless or the party shows good cause for the failure to disclose. In addition to or in
109 lieu of this sanction, the court on motion may take any action authorized by paragraph
110 (e)(2).

111 (i) **Failure to preserve evidence.** Nothing in this rule limits the inherent power of the
112 court to take any action authorized by paragraph (e)(2) if a party destroys, conceals,
113 alters, tampers with or fails to preserve a document, tangible item, electronic data or
114 other evidence in violation of a duty. Absent exceptional circumstances, a court may not
115 impose sanctions under these rules on a party for failing to provide electronically stored
116 information lost as a result of the routine, good-faith operation of an electronic
117 information system.

118 **Advisory Committee Notes**

119 The 2011 amendments to Rule 37 make two principal changes. First, the amended
120 Rule 37 consolidates provisions for motions for a protective order (formerly set forth in
121 Rule 26(c)) with provisions for motions to compel. By consolidating the standards for
122 these two motions in a single rule, the Advisory Committee sought to highlight some of

123 the parallels and distinctions between the two types of motions and to present them in a
124 single rule.

125 Second, the amended Rule 37 incorporates the new Rule 26 standard of
126 "proportionality" as a principal criterion on which motions to compel or for a protective
127 order should be evaluated. As to motions to compel, Rule 37(a)(3) requires that a party
128 moving to compel discovery certify to the court "that the discovery being sought is
129 proportional under Rule 26(b)(2)." Rule 37(b) makes clear that a lack of proportionality
130 may be raised as ground for seeking a protective order, indicating that "the party
131 seeking the discovery has the burden of demonstrating that the information being
132 sought is proportional."

133